

THE PARRHESIA PROJECT

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Comments submitted in response to The Federal Communication
Commission's Notice of Proposed Rulemaking *Restoring Internet
Freedom*, WC Docket 17-108

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Summary

The Parrhesia Project, a non-profit organization, hereby provides the following comments for inclusion in the administrative record for the Federal Communications Commission's ("the Commission" or "FCC") Notice of Proposed Rulemaking, WC Docket No. 17-108 (the "NPRM") regarding (i) the proposed reclassification of broadband internet access services as an 'information service' and thereby regulated under Title I of the Communications Act of 1934 (the "Communications Act") and (ii) the repeal of 47 CFR Part 8 Section 8.11 which codifies what the Commission refers to as the internet conduct standard promulgated under its 2015 Title II order (hereinafter collectively referred to as the "Proposed Actions"). Specifically, we wish to raise the following concerns with the Proposed Actions pursuant to the NPRM:

1. The Commission's Proposed Actions represent a clear change in FCC policy, which triggers certain requirements of the Administrative Procedure Act of 1946 (the "APA"). Specifically, the requirements of the APA as interpreted by the Supreme Court of the United States in *Federal Communications Commission v. Fox Television Stations, Inc.*, where the Court found that a federal agency must, when departing from prior policy, at the very least provide "good reasons" for the departure, i.e. provide a reasoned basis for the policy change. It is our contention that the NPRM fails to satisfy this fundamental requirement by provided no reasoned basis for the Proposed Actions.
2. Additionally, pursuant to *Fox*, when an agency's new policy "rests upon factual findings that contradict those which underlay its prior policy" then the agency must provide a "reasoned explanation...for disregarding facts and circumstances that underlay ...prior policy." Therefore, according to *Fox*, it is not sufficient in this instance for the Commission to simply meet the 'reasonableness' standard the APA requires of a novel rulemaking, a heightened scrutiny applies that requires the FCC to reconcile with its earlier factual findings. It is our contention that this heightened requirement pursuant to *Fox* is likewise unsatisfied by the NPRM.

The Commission's NPRM does not Provide Sufficient Evidence to Support its Rationale for the Proposed Actions as Required by the APA and Fox

Should the Commission's NPRM translate into final rules enacting the Proposed Actions, a reviewing court will invariably ask a threshold question: "why did the FCC consider it *necessary* to reclassify ISPs as 'information service' providers¹ rather than their current FCC classification as 'telecommunication service' providers²?" Or more directly, "why did the FCC think reclassification was reasonable, both on its face and in light of alternatives, including inaction?"

In order for the FCC's Proposed Actions to be considered reasonable, its rationale behind changing this regulatory policy must meet the applicable standards of the APA as confirmed by the U.S. Supreme Court in *Federal Communications Commission v. Fox Television Stations, Inc.*³. Fox therefore demands of the FCC here what anyone would: provide the evidence that supports your conclusion.

According to the NPRM, the Commission concluded ISP service reclassification is needed for a facially straightforward reason: the Commission would reclassify ISPs as 'information service' providers⁴ because the 2015 classification of ISPs as telecommunication service providers *caused* a reduction of capital investment in broadband infrastructure. However, the evidence provided by the Commission in the NPRM fails to support this finding.

The Evidence Currently Offered by the FCC Does Not Support its Rationale for Action

We agree with Commissioner Clyburn's dissent's characterization of the NPRM as possessing "a dearth of economic and technical depth...[with] no cogent economic analysis to be found."⁵ The Commission's alleged support for its assertion that Title II classification beginning with the FCC's 2015 Title II Order caused a decline in broadband infrastructure investment can be found in **only 2 out of 243** footnotes of the NPRM. These are the only references to allegedly objective analyses of the threshold question: whether Title II classification caused a broadband infrastructure investment decline.

Dr. Ford's Misguided Counterfactual

¹ Or in the language of the Communications Act's statutory scheme, 'enhanced service' providers.

² Or 'basic service' providers using the terms of the Communications Act.

³ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009)

⁴ See NPRM para. 27

⁵ NPRM Dissenting Statement of Commissioner Mignon L. Clyburn, page 2.

The seemingly more comprehensive of the two analyses cited by the Commission to provide rationale for its Proposed Actions can be found in footnote 114 of the NPRM⁶: a paper, published the day before this docket first appeared on the FCC website, authored by Dr. George S. Ford of the Phoenix Center for Advanced Legal and Economic Public Policy Studies titled *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*. In it Dr. Ford attempts to perform a “counterfactual empirical analysis of the effects of reclassification on investment in telecommunications.”⁷ Dr. Ford sees this approach as necessary because “the economically valid measurement of the effect of regulation requires a counterfactual – that is, how much firms would have invested “but for” the regulatory intervention.”⁸ After conducting his counterfactual, Dr. Ford concludes that “between 2011 and 2015 (the last year data are available), the threat of reclassification reduced telecommunications investment by about 20% to 30%, or about \$30 to \$40 billion annually.”⁹

The problem with Dr. Ford’s analysis though is its control group. Dr. Ford correctly states:

“To produce quality causal effects, the [methodology used herein] requires a suitable control group of economic sectors. This control group establishes the counterfactual, which is the expected level of telecommunications investment absent the threat of Title II reclassification. The goal is to find a control or group of controls where the economic outcomes are expected to be similar to those of the treated group through time.”¹⁰

But the selection of the control group for Dr. Ford’s analysis does not, as he rather nakedly asserts¹¹, appear reasonable. His selection of comparable economic sectors to represent ‘how the telecommunications industry would have expended investment capital but for the threat of Title II reclassification’ was based “solely on pre-treatment investment trends.”¹² Dr. Ford does not consider any other factor when selecting his control group; he does not ask basic questions of relevance, such as “do the selected industries react to macroeconomic factors in the same way as the telecommunications sector when deciding whether to deploy capital?” Or “why is it reasonable to infer that the investment decisions made by the control group during the time period assessed reflect what the telecommunications industry would have decided without Title II classification?” Or most fundamentally “are there similar economic effects of federal regulation on the control group sectors that compare to how regulation affects the capital expenditure decisions of the telecommunications sector?”

Rather than delve into these or any other questions of reasonableness in selecting his control group, Dr. Ford instead opts to simply find a statistical correlation between the pre-2011 investment trends

⁶ NPRM fn. 114: See George S. Ford, *Net Neutrality, Reclassification and Investment: A Counterfactual Analysis*, Phoenix Center for Advanced Legal & Economic Public Policy Studies, Perspectives 17-02, <http://www.phoenix-center.org/perspectives/Perspective17-02Final.pdf>

⁷ Ford at 2

⁸ *Id.* at 10

⁹ *Id.* at 2

¹⁰ *Id.* at 5-6

¹¹ *Id.* at 6

¹² *Id.* at 5

of the telecommunications industry with four sectors: (i) machinery manufacturing, (ii) computer and electronic products manufacturing, (iii) plastic and rubber products manufacturing, and (iv) transportation and warehousing. Based solely on this statistical correlation Dr. Ford then deems these four sectors' investment trends post FCC threat of Title II reclassification in 2011 as the appropriate counterfactual, i.e. representative of the investment trend that the telecommunications industry would have enjoyed from 2011 to 2015 but for Title II reclassification.

However, such a statistical correlation alone is insufficient to determine an appropriate control group. Correlation of investment trends pre-2011 among these industries without more does not support the conclusion that, to use Dr. Ford's own words, 'the economic outcomes' among these industries would continue to correlate after 2011. There are a multitude of other factors that need to be considered, most notably whether investment decisions within these industries are made based on similar inputs. As Dr. Ford states in his paper, "Capital expenditures are determined by many factors."¹³ It would therefore appear that by not considering anything other than a statistical correlation of investment trends pre-2011, Dr. Ford selected the control group for his counterfactual in an arbitrary fashion. Simply put, more than a correlation of investment trends is needed to determine an appropriate control group for an accurate counterfactual to be conducted.

By failing to contemplate any factors that actors in each economic sector consider when assessing whether to expend investment capital Dr. Ford selected his control group with no basis for asserting it as a valid control that reflects the economic outcomes of the telecommunications sector but for Title II classification. Dr. Ford's counterfactual performed represents an irrelevant analysis between capital expenditures made by the telecommunications industry post threat of Title II reclassification and four other economic sectors whose capital expenditures may or may not be determined by the same factors as those considered by the telecommunications industry. Consequently, Dr. Ford's analysis holds no merit and should not be considered as persuasive evidence of a causal relationship between the FCC's 2011 threat of Title II reclassification and a decline in broadband infrastructure investment thereafter.

Mr. Singer's Correlation Survey

The Commission's only other reference to alleged objective analysis of whether Title II reclassification caused a decline in broadband infrastructure investment can be found in the immediately prior footnote to Dr. Ford's so-called counterfactual; in footnote 113 the Commission cites Hal Singer's *2016 Broadband Capex Survey: Tracking Investment in the Title II Era*.¹⁴ First published on March 1, 2017 rather than a year earlier as indicated in footnote 113 of the NPRM, Mr. Singer, Senior Fellow at the GW Institute for Public Policy, compares capital expenditures of the 12 largest American ISPs during 2014, the last year in which ISPs were not subject to common carrier (i.e. Title II) regulation¹⁵, verses their capex activity in 2015 and 2016. His comparison

¹³ Ford page 2.

¹⁴ NPRM fn. 113: Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era* (Mar. 1, 2017 [sic]) <https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era>

¹⁵ See Singer par. 1

leads him to conclude that “across all twelve firms, domestic broadband capex declined by \$3.6 billion, a 5.6 percent decline relative to 2014 levels.”¹⁶

Mr. Singer’s blogpost provides scant background to his analysis that would support critical assumptions made therein; for example the largest decline of capex from 2014 to 2016 by one of these ISPs occurred with Sprint (-62.7%), but this figure excludes capex made by Sprint for ‘leased devices’¹⁷. Mr. Singer attempts to justify this exclusion by stating “it is important to ignore Sprint’s capitalization of handsets, an accounting change that occurred in the middle of the experiment.”¹⁸ But is capitalization of handsets the same as ‘capex for leased devices’? Without further elucidation of Mr. Singer’s methods, we simply do not know.

Assuming though that his assumptions hold merit, Mr. Singer’s survey provides evidence of mere correlation between a trend in large ISP investment decline and the enactment of Title II regulation. Therefore, this analysis offers nothing in support of the FCC’s rationale for reclassification back to Title I as it does not offer any evidence of causation between Title II regulation and broadband infrastructure investment decline. Correlation alone is insufficient to support a finding of causation. Consequently, Mr. Singer’s survey should have no bearing on whether the FCC ultimately decides to move forward with its Proposed Actions.

The Evidence Cited by the Dissenting Commissioner Undermines the Commission’s Rationale for Reclassification, Resulting in Insufficient Support for its Proposed Actions

In her dissenting statement to the NPRM, Commissioner Clyburn raises serious issues her counterparts on the Commission should carefully consider before moving forward. One relevant to this discussion is the fact that there is ample empirical evidence that runs counter to the Commission’s assertion that Title II reclassification of ISP services led to a decline in broadband infrastructure investment.

Specifically, Commission Clyburn cites an article published by Consumerist, the non-profit subsidiary of Consumer Reports, in which the author Chris Morran raises an interesting point: while the FCC keeps harping on about investment decline since Title II reclassification, publically traded ISPs have actually *increased* their capital expenditures for infrastructure investment.¹⁹

Unlike the Commission in the NPRM, Mr. Morran actually has the evidence to back-up his claim as he cites data and statements provided by the largest ISPs in the country in their annual and

¹⁶ *Id.* par. 1.

¹⁷ *Id.* at fn. 3 of table provided

¹⁸ *Id.* par. 2

¹⁹ See Chris Moran, FCC Chair Claims Broadband Investment at Historic Low Level Because of Net Neutrality; That’s Not What the Numbers say, Consumerist (Feb. 28, 2017), <https://consumerist.com/2017/02/28/fcc-chair-claims-broadband-investment-at-historic-low-level-because-of-net-neutrality-thats-not-what-the-numbers-say/>

quarterly earnings reports. For example, in the most recent earnings report issued by Comcast at the time of publication (February 2017), Comcast noted that in 2016 year-over-year capital expenditures increased 7.5% to \$9.1 billion.²⁰ Further, the vast majority of this amount went to Comcast's Cable Communications Division, quoting the report: "primarily reflecting increased investment in line extensions, a higher level of investment in scalable infrastructure to increase network capacity and continued spending on customer premise equipment related to the deployment the X1 platform and wireless gateways."²¹

In AT&T's most recent earnings report, Mr. Morran pulls annual capital investment figures reported as \$22.9 billion in 2016, up from \$20.7 billion in 2015 and still in excess of the 2014 figure of \$21.4 billion as well as all figures from 2011, 2012 and 2013²²; recall that in 2014 and years prior ISPs were not subject to Title II. The same basic trend of continued infrastructure investment by large ISPs since Title II reclassification is further supported by Mr. Morran's summary of reports by Verizon, Time Warner Cable/Charter, and CenturyLink.²³

Further, an article published by the Consumerist in February 2016 summarizing what these same ISPs told their investors during 2015 earnings calls illustrates that these ISPs themselves are confident in their abilities to continue spending on infrastructure, citing either increases from 2014 to 2015 in capital expenditures on broadband infrastructure or negligible declines.²⁴

Given the Evidence, if the FCC enacts the Proposed Actions as Final Rules they should be Considered Arbitrary and Capricious Actions under the APA

To reiterate, the rationale for the FCC's proposed ISP service reclassification in the NPRM is that ISP service reclassification in 2015 caused a decline in broadband infrastructure investment. As shown above, the FCC has so far provided no objective, credible, relevant economic analysis to support this rationale. Additionally, large ISPs have provided through publically available financial reports evidence of infrastructure spending increases since Title II reclassification, and such ISPs have assured their investors infrastructure investment will continue.

The lack of credible supporting evidence for its rationale to reclassify ISP services renders the Commission's Proposed Actions in the NPRM as wholly unsupported by the record. Accordingly, the Proposed Actions if enacted via final rules would have no basis and should be considered 'arbitrary and capricious' under the APA.

²⁰ See *Id.*

²¹ See *Id.*

²² See *Id.*

²³ See *Id.*

²⁴ See Kate Cox, Did Net Neutrality Kill Broadband Investment Like Comcast, AT&T, Verizon Said It Would? (February 9, 2016) <https://consumerist.com/2016/02/09/did-net-neutrality-kill-broadband-investment-like-comcast-att-verizon-said-it-would/>

Under Section 706 of the APA, a reviewing court can set aside agency action if the action is found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²⁵ The Supreme Court provided clear guidance as to what constitutes an arbitrary and capricious agency action in *Motor Vehicle Manufacturers’ Association v. State Farm Mutual Automobile Insurance Co.* where the Court stated:

“Normally, an agency rule would be arbitrary and capricious if the agency has...offered an explanation for its decision that runs counter to the evidence before the agency.”²⁶

The Court in *Fox*, citing *State Farm*, found that a federal agency must, when departing from prior policy, at the very least provide “good reasons” for the departure, i.e. provide a reasoned basis for the policy change.

If, however, the FCC enacts its proposed policy change of reclassifying ISP services on the basis that its current classification under Title II has caused a decline in broadband infrastructure investment, the current evidentiary record cannot support a finding that this decision was ‘entirely rational’ or based on ‘good reasons’ as it clearly runs counter to the evidence currently before the Commission. Accordingly, under the standard of review outlined in *Fox*, the Commission presently has no basis to move forward with its Proposed Actions outlined in the NPRM.

The FCC’s Proposed Reclassification Rests Upon Factual Findings that Contradict those which Underlay its Prior Policy, Triggering Enhanced Fox Scrutiny

The Court in USTelecom Applied Heightened Fox Scrutiny to the FCC’s 2015 Decision to Reclassify; it Follows then that the same Scrutiny Applies Here

If the Commission does decide to move forward, it must not only provide evidence to support the reasonableness of its assertion that reclassifying ISP services is necessary to remove the alleged effect Title II had on broadband infrastructure investment decline, it will also have to satisfy an additional level of scrutiny because this decision would run counter to factual findings that supported its 2015 decision to classify ISP services under Title II.

According to the Court in *Fox*, when “[an agency’s] new policy rests upon factual findings that contradict those which underlay its prior policy...it would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”²⁷

²⁵ 5 U.S.C. Sec. 706(2)(A)

²⁶ See *Motor Vehicle Manufacturers’ Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983)

²⁷ *Fox* at 515-16.

Therefore, the FCC would need to offer evidence that not only supports its new policy to classify ISP services under Title I, under *Fox* it would also have to provide a reasoned explanation for disregarding its previously provided factual support for its 2015 classification under Title II. In fact, the D.C. Circuit Court of Appeals applied this additional scrutiny under *Fox* when it reviewed the FCC's 2015 action to classify under Title II in the *USTelecom* case.²⁸ It stands to reason then that another FCC reclassification would be assessed using the same heightened standard of review.

The Commission has not Provided any Evidence that Addresses Heightened Fox Scrutiny

Presently, there has been no attempt by the Commission to reconcile its currently proposed reclassification with the facts it provided to support its 2015 reclassification. Accordingly, the proposed actions outlined in the NPRM would also fall short of the applicable heightened *Fox* scrutiny that was applied in *USTelecom*. Therefore, should the Commission decide to enact final rules enacting its Proposed Actions based on the record of the NPRM, there is additional cause for a court to find such rules as arbitrary and capricious.

Conclusion

At present the administrative record provided by the Commission through its NPRM to support its Proposed Actions, namely its suggested reclassification of broadband internet access services as an 'information service' and thereby regulated under Title I of the Communications Act and the proposed repeal of 47 CFR Part 8 Section 8.11 which codifies what the Commission refers to as the internet conduct standard promulgated under its 2015 Title II order, provides no evidence of substance to support its rationale for doing so. We therefore implore the Commission to seriously reconsider its Proposed Actions and avoid what currently will amount to fruitless litigation resulting in a finding that the FCC's final rules enacting its Proposed Actions were arbitrary and capricious under the APA and consequently stuck down.

²⁸ See *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir 2016)